NO. 49511-2-II
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

MICHELLE BAXTER

Plaintiff/Appellant,

v.

RICHARD AH LOO, CATHERINE KONISETI,

Defendants/Respondents,

APPEAL FROM THE SUPERIOR COURT OF CLARK COUNTY, THE HONORABLE GREG GONZALEZ, CAUSE No. 16-2-00761-2

REPLY BRIEF OF APPELLANT

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INTRODUCTION

In reply, the Plaintiff presents a brief factual rejoinder, before offering argument on several points raised in the Defendant's brief.

FACTUAL REJOINDER

The Defendant's brief relies on facts that are not supported by the record.

Factual Rejoinder No. 1: The trial court *did not,* as the Defendant claims, base its decision on the *White v. Holm* factors

The Defendant repeatedly states that, when the trial court vacated the judgment in this case, the trial court considered the factors from *White v. Holm,* 73 Wn.2d 348(1968). In his brief, for example, this Court will read, "the trial court properly exercised its broad discretion under CR 60, under the relevant factors described in *White v. Holm* and its progeny, to vacate the default judgment." See pp. 4-5, Resp. Brief. In the same paragraph, the Defendant

mentions these factors by name: "strong or conclusive defenses," "vacating...would not unduly delay or prejudice Baxter's pursuit of her claims..." Id. The Defendant says that Judge Gonzalez used *White*.

That is not true, however. Judge Gonzalez never considered the *White* factors. In fact, his written opinion never once cites *White*. The *White* factors are never mentioned or alluded to, even obliquely or vaguely. Instead, Judge Gonzalez vacated the judgment based *solely* upon what he referred to as "an inequitable attempt to conceal the existence of the litigation." CP p. 111.

To Judge Gonzalez, that means that *Gutz v. Johnson*, a companion case contained with the opinion of *Morin v. Burris,* 160 Wn.2d 745, 161(2007), is the law that applies. In his "Applicable Case Law" section, Judge Gonzalez cites CR 60, and then goes on to *Gutz v. Johnson* and its factual precedent, wherein, according to Judge Gonzalez, "the court addressed the issue of an attorney's duty to disclose the details of litigation to adverse parties."

Judge Gonzalez did *not* consider *White*. His opinion is based solely on the supposed concealment of litigation.

Factual Rejoinder No. 2: the Plaintiff *did not,* as the Defendant argues, mislead the trial court. Further, the trial court *did not*, as the Defendant argues, find that the Plaintiff misled the trial court. Instead, the trial court sanctioned the Defendant for providing "demonstrably false" evidence to the trial court

Repeatedly, the Defendant claims that Plaintiff Counsel misled the trial court (which, to be clear, should be read as a factual issue that is separate from whether the Plaintiff misled the Defendant). On page five, for example, the Court will read that the Plaintiff used "deception...of the trial court" to "take a default." The most bold and strident example can be found on page 11 of the Defendant's Response:

> *Never did Mr. Hojem advise Judge Gonzalez that "Ah Loo's adjuster" had indeed attempted to respond directly to "the email asking if they are going to be defending the case" - and on more than one occasion. Instead, counsel stood on his unqualified representation that "I did not receive a response... written or not." That statement quite simply was not true.*

The Defendant's repeated characterization – that, by claiming there was "no response" that Plaintiff's Counsel

attempted to mislead the trial court – is false because it ignores the simple fact that, when litigators discuss "responses" to lawsuits, they mean *formal* responses, ones that conform to our Rules of Civil Procedure. Those rules repeatedly refer to "responses to lawsuits," and when they do, they refer to *formal responses*. That is, a capital-A *Answer* to the lawsuit; *that* is how you "respond" to a lawsuit. Our summonses, for example, instruct a defendant to "respond to the complaint by stating your defense in writing." CR 4(b). A summons must also warn a defendant that, "a default judgment is one where plaintiff is entitled to what he asks for because you have not responded." Id.

At the very least, a notice of appearance can be viewed as a "response," as it is authorized by CR 4. While CR 4 specifies that any notices of appearance must be in writing, sometimes, *attorneys* – but *not* adjusters – will attempt to make an "oral notice of appearance," which, while not technically compliant with our Rules, are often treated as such. In *Seek Sys. v. Lincoln Moving/Glob. Van Lines*, for illustration, Division 2 observed,

> *[W]e assume that a single phone call can constitute a notice of appearance if the caller is one who could appear for the defendant, the caller recognizes that the case is in court, and the caller manifests an intent to defend.*

63 Wn. App. 266, 270(1991)(internal citations omitted).In summary, *written* filings and, perhaps, in certain limited circumstances, spoken words, can constitute a "response" to a lawsuit. But, under no circumstances, is a call or calls from an insurance adjuster a "response" to a lawsuit according to our Rules.

Thus, because the Defendant had not filed anything, and had not attempted to make an "oral notice of appearance" as that concept is described in *Seek Sys., supra,* it was accurate to say that no "response, written or oral," was made.

This truth – that Plaintiff Counsel and Judge Gonzalez were using the word "response" to mean a *formal* response – is plain in the record, but the Defendant's quotations on this factual issue seem to intentionally omit words that would help this Court accurately assess the truth.

In the following quotation, the words presented in **bold typeface** are words that were removed from the Defendant's quotations on this issue.

The Court: *We are 34 days past the date of service. And you've not had a response?*

Pl. Counsel: *That is correct, Your Honor. In my declaration, I explain that I actually went above and beyond the requirements of the Rules of Civil Procedure, and I, uh, actually emailed the – the Complaint, the Summons and the Declaration of Service to, uh, Mr. Ah Loo's adjuster,* ***saying that no one has appeared****. I asked, uh, in one email if they were going to be defending the case. I did not receive a response.* ***And then I sent another one with those documents, uh, letting the insurer know that there's one more week before we pursue a judgment – um, a default judgment. And no one has responded.***

The Court: ***On your motion for default, we'll start with that. It appears that service...took place on April 16th. No one has responded. There's nothing in the court file to reflect the Notice of Appearance. It appears that you notified the insurance company that an Order of Default will be forthcoming if they fail to respond; is that correct?***

Pl. Counsel: ***That is correct, Your Honor.***

CP p. 118, ll. 1-22 (with added emphasis in the form of underlined typeface). Thus, both Plaintiff Counsel and Judge

Gonzalez said that no one "responded" because no one has "appeared" or filed a "Notice of Appearance." The Defendant removed language that would allow this Court to make the connection.

The Defendant takes this misrepresentation one step further, beyond merely alleging dishonesty, but also saying that the trial court *itself* found that the Plaintiff misled the trial court. On page 39 of the Defendant's response, for example, the Court will read, "As Judge Gonzalez explained, the trial court concluded Baxter's attorney had...been untruthful with the trial court..."

This is simply not true. The trial court found – erroneously and nonsensically – that the Plaintiff concealed certain facts about the litigation from the Defendant. But it never claimed that the Plaintiff mislead the court.

Instead, the trial court sanctioned the *Defendant* under CR 11 for submitting "demonstrably false" evidence to the trial court. Judge Gonzalez wrote,

> *This Court in its decision does hereby make a finding of fact that the pleading in question is not well-grounded in fact, and in violation of CR 11.*

CP 111. For that, the Defendant paid terms. CP 112. Thus, not only did the trial court *not* find that the Plaintiff misled the trial court, it was a) *looking for* deceitful practices and attempts to mislead the trial court, and b) in those efforts, found only that the *Defendant* misled the trial court.

The Plaintiff tried to avoid broaching this issue, as it originally seemed unnecessary and, frankly, undignified. But this Court must not mistake the facts on appeal.

Factual Rejoinder No 3: The Plaintiff's May 12, 2016 e-mail to the Defendant's insurer was not "misleading"

The Defendant repeatedly argues that, somehow, the Plaintiff's email to the Defendant's insurer, in which she gave the insurer notice of a default judgment, was misleading. The Court will read, for example, on page 41 of the Defendant's Response,

> *Baxter also disingenuously states, repeatedly, that her counsel gave Kemper "notice that a default judgment was pending," when her Counsel's May 12, 2016 email sad nothing of the sort, and in fact said just the opposite.*

To see the falsity of this, simply read the e-mail in full: "If no one appears within a week, we will move for default judgment." CP 75. The Plaintiff cannot conceive how this is

"the opposite of" telling the Defendant that a default judgment was to be expected in one week.

The Defendant seems to argue that, because the Plaintiff actually scheduled the hearing *before* that week had elapsed, it was somehow misleading. See Def. Resp., p 9, which reads, "Having just sent that e-mail stating that he would not bring a motion for default during a one-week grace period, Mr. Hojem immediately noted a hearing date..."

Yet, the May 12 e-mail stated that, one week later, the Plaintiff would "move for default judgment." The operative word is *move.* It never says that no hearing would be scheduled in the meantime. It never says that, one week later, the Plaintiff would *begin to start the process* of obtaining a default judgment. The email said the Plaintiff would move in a week, and the Plaintiff moved in a week.

There was nothing misleading about this courtesy notice.

Factual Rejoinder No 4: There was no "stonewalling" of the Defendant's insurer. Instead, all that happened is, after the Plaintiff *gave courtesy notice,* but *before* the judgment was entered, Plaintiff Counsel did not return two phone calls from an adjuster

The Defendant claims that Kemper made repeated attempts to contact Plaintiff Counsel, *after* receiving notice of the pending default judgment, but *before* the judgment was entered.

Reading the Defendant's Response, one receives the impression that these attempts were voluminous: "Kemper repeatedly attempted to communicate with [Plaintiff Counsel] in response to his e-mail..." (p. 10); "For the next week, Hojem repeatedly ducked calls from Kemper – apparently because if they couldn't ask, he would not have to tell" (p 38).

To support these contentions, the Defendant cites the following pages of the Clerk's Papers: 36-38, 40-41.

Pages 36-38 of the Clerk's Papers are the declarations of Ms. Karen Pearson, wherein she claims to have made three phone calls, two of which occurred *before* the Default Judgment was entered.

In pages 40-41, we see a Gary Western explaining how and why he was retained in this case, on May 20. He does not describe any previous attempts to contact the Plaintiff.

Thus, the record shows that, *after* the Plaintiff warned Kemper of a default judgment, while the Plaintiff was waiting for an *attorney* to *appear* according to the Rules of Civil Procedure, Plaintiff Counsel refused to return *two* phone calls from an adjuster who, according to the adjuster, *knew that a default judgment could occur within a matter of days,* yet did not do anything to stop it – that is, did not hire an attorney – until *after* it had occurred.

ARGUMENT

A. This is nothing like Morin/Gutz – and that is why the trial court must be reversed

Above, the Plaintiff attempts to correct the Defendant's misrepresentation, that the trial court made its decision on the *White* factors. It did not. Instead, it applied *Morin/Gutz,* 160 Wn.2d 745, and did so erroneously.

In *Morin/Gutz,* our Supreme Court held that a lawyer makes an "inequitable attempt to conceal the existence of the litigation" when, while responding to the defendant-insurer's post-litigation communication, he "fail[s] to disclose": 1) "the fact that the case had been filed," and; 2)

"that a default judgment [is] pending."[1] *Morin v. Burris*, 160 Wn.2d at 759.

That is, in *Morin/Gutz,* our Supreme Court held that when a defendant-insurer calls a plaintiff who has filed a lawsuit, that plaintiff must not omit the fact that a lawsuit has been filed, and that the defendant is in default.

Here, however, *without any prompting from the Defendant* – that is, spontaneously, out of courtesy – the Plaintiff went out of her way to disclose: 1) that there was litigation, and; 2) that a default judgment was pending. That is, what *Gutz* says a plaintiff must do when a defendant-insurer calls, the Plaintiff did *even though no one from the Defendant-insurer called.* This is not a slight factual variation from *Morin/Gutz.* It is the complete opposite. What *Morin/Gutz* forbids, the Plaintiff doubled her efforts to avoid.

To illustrate this point, a metaphor might help. The existence of litigation and the imminence of a default judgment can be viewed as an "elephant in the room."

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[1] To aid clarity, the entire citation can be read as follows: "But counsel's failure to disclose the fact that the case had been filed and that a default judgment was pending when the Johnsons' claim representative was calling and trying to resolve matters, and at a time when the time for filing an appearance was running, appears to be an inequitable attempt to conceal the existence of the litigation. *Morin v. Burris*, 160 Wn.2d 745, 759 (2007)

Morin/Gutz tells us that, if a defendant-insurer calls about a case, a plaintiff may not fail to mention the "elephant in the room." Here, though, the Plaintiff conspicuously led the elephant in the room, said the defendant-insurer, "Look at this elephant. You need to respond to this elephant. You can have extra time to respond, but you do need to respond. If you don't, there will be consequences." This metaphor, while tortured, admittedly, clarifies the factual difference at play.

Thus, the trial court's application of *Morin/Gutz* simply makes no sense. It defies logic. *Morin/Gutz* says to not conceal two facts while the other side is in default. Here, the Plaintiff successfully provided those facts to the Defendant's insurer *on her own initiative.*

The trial court has misread and misapplied *Morin/Gutz.* This must be reversed.

B. The Defendant's argument turns our Rules of Civil Procedure on their head

One simple fact that seems to escape the Defendant (and the trial court), is that, on the day the Plaintiff sent courtesy notice of both the lawsuit and the imminent default judgment, the Plaintiff could have done something else:

simply moved for default judgment without giving notice. On that day – May 12 – the Defendant's response to the lawsuit was six days late, and no one had appeared.

Why? Because our Rules of Civil Procedure say that, after a defendant gets served with a lawsuit, it is the *defendant's* job to make a timely response.

According to the Defendant's argument, however, it is the plaintiff's job – through courtesy notices, and by returning each and every phone call from an insurance adjuster – to coach the other side through the formal requirements of our Rules.

Judge Gonzalez actually makes this express. In his decision, he faults Plaintiff Counsel for, after providing the *original* courtesy notice, for not then giving successive notices.

> *Plaintiff knew if the adjuster failed to retain counsel...the order of default would be signed by the Court...Rather than returning the adjuster's phone call, or as he had done previously, sending another email to this new adjuster, it appeared the plaintiff's attorney chose to ignore the adjuster's inquiry altogether.*

CP at 112. Thus, the trial court truly does believe that, if a plaintiff gives courtesy notice, the plaintiff thereby assumes responsibility for walking the defendant through the Rules of Civil Procedure.

What would these phone calls – if taken by Plaintiff Counsel – have been like? Remember, Plaintiff Counsel had *already* told the Defendant-insurer that there was a lawsuit, and that someone needed to "appear." Was the adjuster calling to confirm those facts? Did she want to know whether the Plaintiff actually expected a response to the lawsuit, when one was already demanded, and – more importantly – required by the Rules, anyway? If the Plaintiff responded affirmatively, could the adjuster call back again later to ask, yet again, whether she *actually* needed to respond to the lawsuit? How many times can an adjuster do this, to re-up what began as a 20-day response time under CR 4, and turn it into an open-ended, informal process, wherein a phone call from an insurance adjuster somehow tolls the time limits set forth under CR 4?

None of this makes sense because the Defendant's argument turns our Rules on their head. No plaintiff has any duty to consult with a defendant-insurer on whether or how the defendant-insurer follows the Rules of Civil Procedure. If the Plaintiff gives courtesy notice, it is nothing more. It certainly does not make the Plaintiff responsible for the Defendant's default.

C. This will discourage courtesy, and inhibit settlement of cases

In this case, providing courtesy to the Defendant has hurt the Plaintiff's case. By providing courtesy to the Defendant's insurer, according to the reasoning of the trial court, the Plaintiff agreed to additional duties. From that point forward, according to the reasoning of the trial court and the Defendant, the Plaintiff gave up the right to expect the Defendant to make a timely appearance, and it was the *Plaintiff's responsibility,* to continue with successive courtesies that, if we follow the trial court's reasoning, take priority over the plain wording of our Rules. If this Court gives credence to the Defendant's argument, then it will be

conclusive: courtesy was a tactical error in this case; courtesies extended by Plaintiff Counsel hurt the Plaintiff.

The same will be true in other cases. Why give courtesy notice, if it can later be used by the defendant to excuse a default? Why give courtesy notice if, in practice, it means a defaulted defendant does not even have to attempt to "excuse" his "neglect," as the Defendant in this case has failed to do? If the Court gives credence to the Defendant's position, anyone who reads the opinion – published or not – will know that, courtesies can *only* hurt a plaintiff.

The same is true for efforts made to settle a case. Why deal with an insurance company at all if a defendant can later claim that those pre-litigation contacts constitute an "appearance"?

If working with an insurer complicates the carefully laid burdens placed on both parties under our Rules, attorneys will refuse to work with insurers.

D. If none of this persuades, remand is still necessary, according to *Morin/Gutz*

The Respondent fails to address *Morin v. Buris*, which requires a trial court, after finding that a plaintiff has made

"efforts to conceal the existence of litigation," to then decide whether "the [defendant's] failure to appear was excusable under equity." 160 Wn.2d at 759. The trial court made no attempt to link the two, and the Respondent ignores the issue altogether.

Thus, if the foregoing arguments do not persuade, remand is still necessary so that Judge Gonzalez can determine whether the Defendant's error was made "excusable" by the Plaintiff's inequitable conduct. That is, he must determine whether the fact that the Plaintiff failed to return two phone calls – *after* the Defendant already had notice and was in default – had any causal relation to the fact the Defendant was in default.

CONCLUSION

The Defendant's argument misrepresents material facts and turns our rules on their head. It must be denied, and the trial court reversed.

Dated this 1st day of March, 2017.

CARON COLVEN ROBISON AND SHAFTON, P.S.

THOMAS HOJEM, WSBA No. 45344

Declaration of Service

The undersigned certifies that under penalty of perjury under the Laws of the State of Washington, that on the date below I caused to be served and filed the attached documents as follows:

Via US Mail:

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DATED at Vancouver, Washington, on the First day of March, 2017.

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March 1, 2017

Washington Court of Appeals, Division II
950 Broadway, Ste. 300
Tacoma, WA. 98402

RE: *Baxter v. Ah Loo & Koniseti*
Court of Appeals No.: 49511-2-II

Dear Clerk:

Enclosed please find the Reply Brief of Appellant in the above-referenced case.

If you have any questions, please do not hesitate to contact us.

Very truly yours,

CARON, COLVEN, ROBISON & SHAFTON, P.S.

Amy Arnold
Legal Assistant to Thomas Hojem

/ala
Enclosures
cc: David M. Jacobi